

# Calendar No. 384

89TH CONGRESS }  
1st Session }

SENATE

{  
REPORT  
No. 400

## PORT OF PORTLAND, OREG.

JUNE 30 (legislative day, JUNE 29), 1965.—Ordered to be printed

Mr. EASTLAND, from the Committee on the Judiciary, submitted the following

### REPORT

[To accompany H.R. 5184]

The Committee on the Judiciary, to which was referred the bill (H.R. 5184) for the relief of the port of Portland, Oreg., having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

#### PURPOSE

The purpose of the proposed legislation is to authorize and direct the Comptroller General of the United States to settle the claim of the port of Portland, Oreg., based upon the amount it was required to pay in satisfaction of a judgment secured against it by the State of Oregon, representing a royalty on material removed from the bed of the Columbia River and supplied to the Department of the Army by the port under a negotiated contract. The bill would authorize the payment in full and final settlement of the claim of an amount not to exceed \$6,226.80.

#### STATEMENT

The facts of the case are found in House Report 260 of the 89th Congress, 1st session, and are as follows:

The bill H.R. 5184 was introduced in accordance with the recommendations of the Comptroller General of the United States in a communication sent to the Congress dated February 15, 1965. The Comptroller General made his recommendation for congressional action in accordance with

the provisions of section 236 of title 31 of the United States Code, providing for recommendations by the Comptroller General in cases of meritorious claims which cannot be settled by him under existing statutory provisions. The situation which gives rise to the claim embodied in H.R. 5184 involved material described as "select subbase fill" which was required for an Air Force project designated project P-341, runway primary instrument, Portland International Airport, 1958 program. This project was a minor military construction project which was subject to the \$200,000 limitation imposed in section 2674(b) of title 10 of the United States Code. The port of Portland, which was dredging in the Columbia River adjacent to the airport, offered to supply and stockpile the material for the Army, which was directing the project for the Air Force, at a cost of \$0.35 per cubic yard as compared with an estimated cost of \$0.90 per cubic yard for procurement and stockpiling from other sources. To accomplish the maximum amount of construction work within the statutory limitation, it was administratively determined to be in the best interests of the Government for the Army to procure the material from the port and to supply it to the construction contractor as Government-furnished property. Accordingly, on January 28, 1959, the negotiated contract was executed, providing, in pertinent part, as follows:

"The above price does not include any royalty payments to the State of Oregon or the State of Washington, or to any authorized board or agency of either of such States. If it is determined that such payments are payable, the Government will assume the responsibility therefor, and make such payments as are so determined."

The port delivered and stockpiled for the Government a total quantity of 50,542.21 cubic yards of the fill, the price of which, at \$0.35 per cubic yard, amounted to \$17,689.77. Final payment was made on October 26, 1959.

On January 3, 1962, the Circuit Court of Multnomah County, Oreg., in a decision subsequently affirmed by the Oregon Supreme Court, held that the port was required by the laws of the State of Oregon to pay to the State a royalty of 10 cents per cubic yard, plus interest to date of satisfaction of judgment, on material removed from the bed of the Columbia River and used more than one-half mile from the riverbed, which included the material supplied to the Government. The share of the judgment chargeable to the Government amounts to \$6,226.80, representing a royalty of \$0.10 per cubic yard on the 50,542.21 cubic yards of fill, \$5,054.22, plus interest at the rate of 6 percent per annum from March 9, 1959, to January 21, 1963, date of satisfaction of judgment \$1,172.58.

On January 30, 1963, the port presented to the Army a claim for the amount of \$6,226.80. Since the construction costs already paid on the project amounted to \$199,020, only \$980 less than the \$200,000 statutory limitation, payment of more than \$980 on the port's claim would constitute a violation of 10 U.S.C. 2674(b).

This committee is impressed by the fact that the Government's contract with the port of Portland specifically provided that the United States would assume the responsibility for the payments of any royalties which might be determined to be due the State of Oregon by reason of the removal of the material which was the subject of the contract. The contract further provided that the contract price did not include any such royalty payments. It is also clear that the imposition of the statutory limitation in this case has created an inequitable burden upon the port of Portland. The amount due the port of Portland totaled just \$23,916.57, while the statutory limitation which bars payment is \$200,000. The port's responsibility only extended to the furnishing of subbase fill and there was no way that the port would have noticed that the statutory \$200,000 limitation might be exceeded on the construction project and that the Government would thereby be unable to fulfill its agreement under the contract. As observed by the Comptroller General in his letter, adherence to the limitation requirement was not a matter within the contractor's control.

In agreement with the House and the recommendations of the Comptroller General, the committee recommends that the bill, H.R. 5184, be considered favorably.

Attached hereto and made a part hereof is the letter of the Comptroller General of the United States sent to the Congress dated February 15, 1965.

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COMPTROLLER GENERAL OF THE UNITED STATES,  
*Washington, D.C., February 15, 1965.*

*The Congress:*

Pursuant to the act of April 10, 1928, 45 Stat. 413, 31 U.S.C. 236, we have the honor to make the following report and recommendation on a claim of the port of Portland, Oreg., for \$6,226.80, on account of material supplied by the port to the U.S. Army Engineer District, Seattle, Wash., under a negotiated contract, Order No. 40-71921, dated January 28, 1959.

The material, select subbase fill, was required for Air Force P-341 project, runway primary instrument, Portland International Airport, 1958 program, a minor military construction project subject to the \$200,000 limitation in 10 U.S.C. 2674(b). The port, which was dredging in the Columbia River adjacent to the airport, offered to supply and stockpile the material for the Army, which was directing the project for the Air Force, at a cost of \$0.35 per cubic yard as compared with an estimated cost of \$0.90 per cubic yard for procurement and stockpiling from other sources. To accomplish the maximum amount of construction work within the statutory limitation, it was administratively determined to be in the best interests of the Government for the Army to procure the material from the port and to supply it to the construction contractor as Government-furnished property. Accordingly, on January 28, 1959, the negotiated contract was executed, providing, in pertinent part, as follows:

"The above price does not include any royalty payments to the State of Oregon or the State of Washington, or to any authorized

board or agency of either of such States. If it is determined that such payments are payable, the Government will assume the responsibility therefor, and make such payments as are so determined."

The port delivered and stockpiled for the Government a total quantity of 50,542.21 cubic yards of the fill, the price of which, at \$0.35 per cubic yard, amounted to \$17,689.77. Final payment was made on October 26, 1959.

On January 3, 1962, the Circuit Court of Multnomah County, Oreg., in a decision subsequently affirmed by the Oregon Supreme Court, held that the port was required by the laws of the State of Oregon to pay to the State a royalty of 10 cents per cubic yard, plus interest to date of satisfaction of judgment, on material removed from the bed of the Columbia River and used more than one-half mile from the riverbed, which included the material supplied to the Government. The share of the judgment chargeable to the Government amounts to \$6,226.80, representing a royalty of \$0.10 per cubic yard on the 50,542.21 cubic yards of fill, \$5,054.22, plus interest at the rate of 6 percent per annum from March 9, 1959, to January 21, 1963, date of satisfaction of judgment, \$1,172.58.

On January 30, 1963, the port presented to the Army a claim for the amount of \$6,226.80. Since the construction costs already paid on the project amounted to \$199,020, only \$980 less than the \$200,000 statutory limitation, payment of more than \$980 on the port's claim would constitute a violation of 10 U.S.C. 2674(b).

Ordinarily, we do not report to the Congress under the act of April 10, 1928, claims which cannot be paid by reason of a statutory or regulatory limitation. In this case, however, there are two factors which, in our opinion, warrant making an exception. First, the contract with the port specifically stated that the contract price did not include any royalty payments, and it also provided that the United States would assume responsibility for payment of such royalties as might be determined to be due to the State of Oregon. Second, the port, whose total claims amount to only \$23,916.57, was the contractor only for furnishing fill material to the Government, and therefore had no way of knowing that the \$200,000 statutory limitation might be exceeded on the construction project for which the material was used. For the same reason, adherence to the limitation requirement was not a matter within the contractor's control. These elements of equity, in our judgment, render the claim such as to be deserving of the consideration of the Congress. In this connection, see *Jefferson Construction Co. v. United States*, Cong. No. 1-62, decided December 11, 1964, in which the Congress referred to the Court of Claims the claim of a construction contractor on a military housing project subject to unit cost limitations prescribed by the military appropriation acts, who was required under directives issued by the contracting officer to perform certain work which the contracting officer considered to be within the terms of the contract but which the contractor regarded as beyond the contract requirements. Finding that the work was in excess of that required by the contract, the court reported that the contractor had an equitable right to recover a sum stipulated by the parties for such work, although the cost of the project was thereby increased beyond the statutory limitation.



If the Congress should agree with our recommendation in this matter, it is suggested that enactment of a statute in substantially the following form will accomplish the desired purpose:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Comptroller General of the United States be, and he hereby is, authorized and directed to settle and adjust the claim of the port of Portland (Oregon) on account of payment of a judgment plus interest to the State of Oregon, pursuant to a decision of the Circuit Court of Multnomah County (Oregon), representing a royalty on certain material supplied to the Department of the Army by the port under a negotiated contract, Order No. 40-71921, dated January 28, 1959, and to allow in full and final settlement of the claim a sum not to exceed \$6,226.80. There is hereby appropriated out of any money in the Treasury not otherwise appropriated the sum of \$6,226.80 for payment of said claim."*

In support of this recommendation there is enclosed a copy of a report dated March 17, 1964, by Col. Ernest L. Perry, District Engineer, U.S. Army Engineer District, Seattle, Wash., with 11 enclosures.

JOSEPH CAMPBELL,

*Comptroller General of the United States.*

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